SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1008

OLGA RUTH DANIEL,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

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OLGA RUTH DANIEL,

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v.

STATE OF GEORGIA,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

Olga Ruth Daniel prays that a writ of certiorari issue to review the decision of the Court of Appeals of Georgia sustaining her conviction of possessing an automobile with serial plate removed and falsified, as to which a Motion For Rehearing was subsequently denied. Certiorari was denied by the Supreme Court of Georgia and a Motion For Rehearing was also denied by it.

OPINION BELOW

The decision of the Court of Appeals of Georgia, printed in Appendix A, *infra.*, is at 118 Ga. App. 370, 163 S.E.2d 863. The denial for the Motion For Rehearing is noted at 118 Ga. App. 375, 163 S.E.2d 863. The actions of the Supreme Court of Georgia were without opinion and are unreported.

JURISDICTION

The decision of the Court of Appeals of Georgia was entered on September 4, 1968. Timely application for rehearing, filed on September 16, 1968 (R. 384) was denied on September 20, 1968 (R. 389). Notice of certiorari to the Supreme Court of Georgia was duly given on September 24, 1968, and certiorari was filed on October 21, 1968 (R. 391). Certiorari was denied by the Supreme Court of Georgia on November 7, 1968 (R. 392), and a Motion For Rehearing duly filed on November 13, 1968, was denied on November 21, 1968.

The jurisdiction of the Court is invoked under 28 U.S.C. 1257 (3) since rights, privileges and immunities were set up and claimed under the Constitution of the United States and are believed to have been improperly denied by the highest courts of the State of Georgia.

QUESTIONS PRESENTED

1.

Was a search and seizure pursuant to search warrant a pretext and illegal where the three items listed to be seized were patently not needed by the State or not expected to be found and were not found, and where circumstances indicated that the search was for matter other than that declared by the State, and should items seized in such search and heavily relied on by the prosecution be suppressed?

2.

Does due process require that a defendant be permitted to see a full pre-trial statement given the State by its principal witness when that witness, who claimed to have been an accomplice of the defendant, had previously

been discredited by the State at the witness' own trial as unworthy of belief but thereafter allegedly informed on defendant and was rewarded by the State for doing so and when circumstances indicate that the fragment of such statement shown defendant was inadequate for proper cross examination?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States:

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner filed a motion and amended motion to suppress and have returned to her evidence seized in a search of her home (R. 9, 13). This motion was denied by the trial Court after a hearing (R. 15). A motion to recon-

sider the denial of the Motion To Suppress (R. 19) was filed and was denied at the commencement of the trial (R. 100-101). Petitioner repeatedly noted her objection to the evidence and testimony resulting from the search (R. 100, 155, 159, 170, 254-256).

There is no dispute that petitioner possessed the automobile in question. Nor is there a dispute (on this record) that the automobile had the original serial plate removed and an improper one affixed. What is disputed is whether petitioner had guilty knowledge of such.

Petitioner bought the automobile for her son, Erby Daniel, in January, 1967, according to petitioner (the indictment (R. 4) alleges possession in January) or in November, 1966, according to the State's principal witness (R. 228). The State's evidence showed it had been stolen in New York on September 23, 1966, and registered there under the false serial number on September 30, 1966 (R. 61). At the commencement of the active investigation by the State in December, 1967, detectives approached the son and were told by him the car was in Florida (R. 145). They had it impounded there and upon examining it found that the original serial plate on the door had been replaced by one with another number. The car had been registered in Georgia by the son under the altered number based on the New York title and license tag.

After examining the car in Florida, the detectives obtained a search warrant for petitioner's home to look for three items: (1) the original serial plate, (2) the New York license tag issued to the altered serial number and (3) the original Georgia title (R. 49, 58). It is petitioner's contention that the detectives did not or could

not expect to find any of these items and that they were listed merely as a pretext to conduct a general search.

None of the three items were found. A certified copy of the Georgia title was obtained from the State and put in evidence (R. 256). When asked why the Georgia title was sought in the search, one of the searching officers said it was for "investigation . . . to match the numbers" (R. 59). He did not explain why such matching could not be done with the papers on record with the State. The New York tag had been recorded with the State of Georgia by the son when he obtained Georgia papers, and it never was explained, though asked, why the detectives needed this item (R. 80), nor why it is reasonably thought that petitioner, who did not live with her son (R. 20), could possibly have it. And although a detective said it "could happen" (R. 65) that the original serial plate was sent to petitioner (after the car had long before been registered in New York with a different serial number), he admitted that he had no information that this was done (R. 81), even though he had taken a detailed statement from a person allegedly present when petitioner obtained the car (to be discussed hereafter). Georgia law (27 Georgia Code 313) holds that "the burden of proving that the search and seizure were lawful shall be on the state".

A lieutenant of the vice squad accompanied the search party, though he had never gone on such a search before (R. 66-68, 84). Although he was evasive on the matter he admitted that he took first custody of five books containing a large number of names seized in the search (R. 82-83). The search that was conducted was pursuant to the search warrant, even though at the time of the

search the detectives had an arrest warrant. The petitioner was not arrested until "after the search" (R. 71).

A receipt reciting a payment of $3,100 for the car made to Erby Daniel (R. 350), a motel receipt showing petitioner's presence in Florida at the time the car was taken there (R. 351), and a tag receipt reciting a transfer of the car from Erby Daniel to petitioner for $4,200 (R. 354), were seized in the search complained of (R. 164-166). Objection was made to their admission in evidence (R. 165, 254-256). These items were heavily relied on by the State in arguing to the jury (R. 279-282), being characterized as "very incriminating evidence" in showing guilty knowledge (R. 280). The State also put on testimony about alleged incriminating conduct and statements of petitioner during and immediately after the search. This was objected to on the basis that testimony regarding an improper search is inadmissible (R. 159, 170). The State argued this testimony to the jury (R. 280).

The principal State witness was one Russell Gugliotta, who claimed to be an accomplice of petitioner (R. 241-242). He had been sentenced after trial in September, 1967, to five years on a charge of possessing an automobile with an altered serial number. At his trial the same Assistant Solicitor who prosecuted the instant case presented four witnesses (an F.B.I. man, Secret Service man, Atlanta police lieutenant, and an employee of the Solicitor's office) who testified that Gugliotta's reputation was bad and they would not believe him under oath (R. 86-93). He was denied a bond pending appeal in October, 1967 (R. 220-221, 74-75). Thereafter he began to talk to the police and was allowed to make bond, being allowed to sign one of them himself (R. 74).

At the beginning of the trial, petitioner moved to preclude Gugliotta's testifying until it could be established that his testimony would be worthy of any consideration (R. 102-104). Petitioner's counsel contended that in making this determination he had the right to review a lengthy statement made to the State by Gugliotta. The Solicitor was queried about the statement and said: "To my knowledge, everything that he has told us that we have been able to verify has proven substantially correct" (R. 106). Petitioner's counsel inquired about one inaccuracy in the statement of which he had hearsay knowledge. The Solicitor, with denying such, claimed that the statement was privileged (R. 107).

Petitioner renewed her objection to Gugliotta being allowed to testify without a foundation being laid prior to his testifying (R. 220-221). Petitioner again asked to see Gugliotta's statement (R. 224). The Court refused the request, citing the "informer rule" (R. 225), albeit the informer was already identified. Although he claimed it would be dangerous to release the information in Gugliotta's statement, the Solicitor offered to "go into detail" in laying a foundation if he could do so "with the jury" (R. 222).

Petitioner's counsel renewed his request to see Gugliotta's statement on cross examining him (R. 252). After Gugliotta's initial cross examination, the Court directed the Solicitor to let petitioner's counsel see the statement "with reference to this particular case and with reference to this particular case only" (R. 257). The Solicitor handed counsel a cut up statement totalling approximately six or seven pages of a statement at least sixty-four legal sized pages (R. 266).

The Solicitor, who claimed he had "anticipated" the

Court's ruling (R. 257), announced, "I hurriedly went through the entire transcript marking with a red pen the parts that I felt pertinent." The Court aided him: "Not the parts that you felt pertinent but the parts related to this case" (R. 260). Petitioner moved to strike Gugliotta's testimony because she was not allowed to see the entire statement (R. 259-260). The Court announced that it would review the entire statement "as hurriedly as possible" to see if the part submitted to petitioner constituted the relevant material and thereafter stated that it did (R. 262-263). Petitioner's counsel renewed his motion (R. 266, 261). The part of the statement shown petitioner contained an apparent contradiction between it (R. 265) and Gugliotta's direct testimony (R. 251) regarding petitioner's knowledge of whether the car was stolen. The Court of Appeals below held that "[t]here is no rule in Georgia entitling the accused to examine evidence in the possession of the prosecution" and that even if the federal *Jencks* rationale applied, there was sufficient compliance with the *Jencks* rule (R. 370-371).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS INCONSISTENT WITH DECSIONS OF THIS COURT AND IS THEREFORE INCORRECT.

A. *The decisions of this Court under the Fourth Amendment and under the due process clause of the Fourteenth Amendment applying the Fourth Amendment to state trials forbid pretext searches and the use of evidence obtained by such searches.*

In *Mapp v. Ohio,* 367 U.S. 643, this Court held that the use of evidence obtained by state officers in a search that did not meet the standards of the Fourth Amendment

was violative of the Fourteenth Amendment. In *Berger v. New York,* 338 U.S. 41, 58, this Court, citing its earlier decision in *Marron v. U.S.,* 275 U.S. 192, held that state warrants must "particularly describe the . . . things to be seized . . . and prevents the seizure of one thing under a warrant describing another."

Yet not only did the courts below permit the use by the prosecution of items seized in a search by warrant which were not listed on the warrant, they also refused to acknowledge the transparent guise by which the warrant was obtained. The warrant purportedly was obtained to seek three items: (1) a serial plate of a stolen car which logic dictates had been removed in a distant state when it was registered there a considerable time previously; (2) a discarded license tag that proved nothing and which it was absurd to think petitioner had ever had, or that she would have retained it if she had it; (3) automobile title papers of which the State had copies of such reliability that it could put them in evidence. That State never explained why it expected to find item No. 1 with petitioner, nor No. 2 nor why No. 2 was needed. As to item No. 3 the only explanation offered was that it was needed for "investigation . . . to match the numbers". Any "number matching" necessary could be accomplished by using the copies on public file rather than invade petitioner's privacy.

It is quite obvious of course from the make up of the search party that the police expected or hoped to find something at petitioner's home. But what that something was, was not spelled out in the search warrant, assuming it was something the police had probable cause to seek. Of course if it were not something proper to seek, the search was *a fortiori* bad. The State did not meet its bur-

den of justifying the seizure of the contested items introduced in evidence. The testimony regarding aspects of the search was also "poisoned fruit" of the unlawful search.

B. *The decisions of this Court under the due process clause of the Fourteenth Amendment require that the State permit a defendant to examine the written statement of a patently unreliable witness for purpose of cross examination.*

In *Mapp v. Ohio,* 367 U.S. 643, this Court decided to elevate to a constitutional level a protection that had previously been afforded only defendants in federal trials, that is the right to suppress illegally obtained evidence. In *Jencks v. U.S.,* 353 U.S. 657, this Court held that in federal cases a defendant's attorney, not the trial judge, should determine whether a statement given by a government witness to the government was relevant and material and possibly contradictory of the witness testimony on the stand. It is submitted that due process requires elevation of the *Jencks* doctrine to a constitutional level in a situation such as that presented in the instant matter, where a State witness, heavily impeached by the State itself previously and with great motive for lying, is used as the State's main witness. *Cf. Brady v. Maryland,* 373 U.S. 83. (This witness, Gugliotta, disclaimed any "deal" for his testimony, but almost a year after his appeal was denied he still has not been sent back to prison.)

The skimpy portions of this witness' statement that defense counsel was permitted to see could hardly be considered an adequate check on the testimony of this highly suspicious person. The review of the statement "hurriedly" by both the Solicitor and the trial judge was insufficient. What they thought was relevant and material is certainly not necessarily what defense counsel or the jury

might think important. (The witness' wild claim that he was helping federal authorities break a counterfeiting ring (R. 240-241) at the same time he was involved in the automobile enterprise that led to his conviction would certainly seem pertinent to an appraisal of his credibility. Presumably a discussion of this matter was in his statement.

In *Jencks* this Court said: "The practice of producing government documents to the trial judge for his determination of relevancy and materiality is disapproved." The statement may have impeachment value. As this Court said similarly regarding the testimony involved in *Jencks:* "The impeachment of that testimony was singularly important to the petitioner." But if a hurried examination of a very long statement by a trial judge is to be used to determine relevancy and materiality, certainly there should be some way for the appellate courts to review what he has done.

The federal statute that codified *Jencks,* 18 U.S.C. 3500, although allowing in camera review, contains two protective features: (1) the Court, not the prosecutor, is the one to initially excise the irrelevant portions of a statement and (2) the full statement is made available to the appellate court on appeal (petitioner suggested in his brief that the Court of Appeals below review the full statement involved here but the suggestion was ignored). Of course these are statutory standards, but it is submitted that they reflect a reasonable compromise to the conflict between the interests of the State and of the defendant.

II. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THE LOWER FEDERAL COURTS AND OTHER STATE COURTS.

In an annotation at 79 *A.L.R. 2d* 1005, "Anno: Search and Seizure—Propriety," it is stated (p. 1009), ". . . the general rule is that the seizure of private papers not specifically described in the search warrant under which the search resulting in the seizure was made is unlawful." The cases supporting this proposition and the cases supporting the exceptions are collected in the annotation. There are also a number of cases suppressing evidence obtained under a pretext search. See *e.g. Amador-Gonzalez v. U.S.*, 391 F2d 308 (CA 5). *Amador* shows that a principal basis for disapproving automobile searches is the fear of the courts that traffic offenses are too often used as pretexts for searches. And see "Anno: Search of Vehicle—Traffic Violation", 10 *A.L.R. 3d* 314.

The lower court cases supporting discovery in criminal cases show that there is considerable momentum toward taking criminal trials out of the game-of-chance status. See Taylor, "Criminal Procedure", 1 *Ga. L. Rev.* 386, 449 ff.; Fletcher, "Pre-Trial Discovery In State Criminal Cases", 12 *Stan. L. Rev.* 293; *People v. Moses,* 11 Ill. 2d 84, 142 N.E.2d 1. One of the more supportive federal cases for seeing the full statement in question in this case is *U.S. v. Borelli,* 336 F2d 376 (CA 2), where it was held that a statement supporting impeachment for bias and interest relates to a witness' testimony.

III. THE CASE IS OF MAJOR IMPORTANCE TO SECURE NATIONAL RIGHTS AND UNIFORMITY OF JUDGMENT.

Despite this Court's decisions in the search and seizure area many State courts still give spotty regard to the Court's pronouncements. If the *Marron* case, *supra*, is to have continuing validity, it is urgent that the Court apply it to the circumstances of this case.

Quite frankly, in asking the Court to apply the *Jencks* rationale to the facts of the instant case, petitioner is asking the Court to move the law a step beyond what it presently is—but it is a short step and one long overdue to be taken.

CONCLUSION

For the above reasons the Petition for Writ of Certiorari should be granted, and the judgment below reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I duly mailed copies of the foregoing petition for a Writ of Certiorari to Hon. Arthur Bolton, Attorney General of Georgia, State Judicial Building, Atlanta, Georgia, and Hon. Lewis Slaton, Solicitor General, Fulton Superior Court, Fulton County Courthouse, Atlanta, Georgia on February....., 1969.

ALBERT M. HORN

APPENDIX A

43647. DANIEL v. THE STATE.

PANNELL, Judge. 1. The defendant was indicted for the offense of "Felony (possessing automobile with serial plate removed) for that said accused, in the County of Fulton and State of Georgia, on the 28th day of January, 1967, did unlawfully possess one Toronado Oldsmobile two-door hard top automobile, a motor vehicle, of the value of $3,200, and the property of Hall Oldsmobile, Inc. knowing that an identification number of said automobile had been removed and falsified, with intent to conceal and misrepresent the identity of said automobile;—contrary to the laws of said State, the good order, peace and dignity thereof." The description of the automobile as "one Toronado Oldsmobile two-door hard top automobile, a motor vehicle, of the value of $3,200, and the property of Hall Oldsmobile, Inc." was a sufficient identification of the automobile. The trial court did not err in overruling the demurrer thereto based thereon. *Glass v. State,* 26 Ga. App. 157 (106 SE 13) and *Sloan v. State,* 68 Ga. App. 92 (22 SE 333), relied on by appellant, do not require a different ruling.

2. Where a motion to quash the indictment on the ground that defendant had not been granted a demanded commitment hearing (see *Whitus v. State,* 222 Ga. 116, 117 (3) (149 SE2d 138); distinguishing *Manor v. State,* 221 Ga. 866 (148 SE2d 305)) is overruled, such action of the trial judge will be affirmed in the absence of a showing that such demand was made. The mere statement of a fact in a motion is not proof of the fact. Whether, if such fact had been

proven, such a motion should be sustained is not decided.

3. At the hearing on the motion to suppress certain evidence obtained pursuant to a search of the defendant's apartment under a search warrant and at the time the defendant was arrested under a warrant, the evidence was sufficient to show probable cause for the issuance of the warrant and that the articles sought might probably be found in the described premises. That these articles were not found, but that similar documents by means of which the identity of the automobile was sought to be concealed were found and seized, does not render the documents found and seized inadmissible in evidence, the search being lawful. See Abel v. U.S., 362 U.S. 217 (80 SC 683, 4 LE2d 668); Zap v. U.S., 328 U.S. 624 (66 SC 1277, 90 LE 1477); Marron v. U. S., 275 U. S. 192 (48 SC 74, 72 LE 231). The trial court, therefore, did not err in overruling the motion to suppress and in admitting the evidence over objection.
4. The fact that a witness for the State had been impeached by the State, as unworthy of belief, in a previous trial of the witness, is not ground for refusing to permit this witness to testify in the present case. See *Code* § 38-1603. There is nothing in Brady v. Maryland, 373 U. S. 83, 87 (83 SC 1194, 10 LE2d 215), requiring a different ruling.
5. Various objections were made to the testimony of a witness for the State on the ground that the court refused to allow counsel for the defendant to examine the entire statement of the witness which was in the possession of the State. After quite a bit of discussion and argument, the prosecuting attorney "hurriedly"

reviewed the statement and assembled the part he thought pertained to the case being tried, but the trial judge was not satisfied with that and he recessed the court, examined the statement and concluded that the parts offered by the prosecuting attorney were all the parts relating to the matters at issue. Defendant's counsel was allowed to examine these portions of the statement. There was no error as to the accused in this proceeding. There is no rule in Georgia entitling the accused to examine evidence in the possession of the prosecution. *Bryan v. State,* 224 Ga. 389, 390 (2) (162 SE2d 349). Even if the Federal rules apply, this was a sufficient compliance therewith. See Jencks v. U.S., 353 U. S. 657 (77 SC 1007, 1 LE2d 1103).

6. There was no error on the part of the court in refusing to recess court in order to give counsel for the defendant time to check the veracity of certain testimony given by this witness, nor did the court err in not allowing the reopening of the case prior to the verdict to develop similar evidence. Counsel for the defendant knew that in all probability this witness would testify in the case and it was not shown that counsel had any probable cause to suspect that he could refute the statements of this witness in connection with the matters involved.

7. The court permitted a police officer to tell of conversations he had with Erby Daniel a relative of the defendant, which testimony, quoting Erby Daniel, showed alleged inconsistencies with defendant's "words and conduct." This evidence was adduced for the purpose of illustrating the conduct of an officer and why he took a trip to a particular locality. It was

admissible for this purpose, even though the defendant offered to stipulate that the officer went to that particular locality as a result of this particular conversation. *Griffie v. State,* 107 Ga. App. 356 (1) (130 SE2d 149); *Kelley v. State,* 82 Ga. 441 (3) (9 SE 171); *Jones v. State,* 224 Ga. 283 (161 SE2d 302); *Code* § 38-302.

8. Enumeration of error 9 is as follows: "The court erred in charging the jury that the defendant had denied she made certain admissions, the defendant not having done so in her testimony." In Part 2 of her brief, the defendant argues this enumeration as follows: "Enumeration No. 9 relates to the court's charge that defendant denied admissions when in fact she did not. It is submitted that the tendency of such charge is to make the jury become confused and think she did so, thus reflecting adversely and prejudicially on her credibility." In Part 1 of the brief the following appears: "In charging the jury the court stated that defendant denied that she had made admissions freely and voluntarily (T-288). Counsel excepted to this charge on the ground that defendant had not done so (T-294). The court said the plea of not guilty denied such. Counsel stated that it tended to pose an issue to the jury that was not there. It is defendant's contention that the charge would make a jury think she is denying something when she is not and thus reflect on her credibility." An examination of the reference shows that the charge related to the denial that admissions had been freely and voluntarily made. This is entirely different from the subject matter of the enumeration of error, and the defendant cannot by brief substitute a new and different enu-

meration for the one actually and clearly made. *Rawls Bros. Co. v. Paul,* 115 Ga. App. 731, 735 (4) (155 SE2d 819). Nor, under these circumstances, where the enumeration of error is clearly made, does Section 3 of the Act approved April 8, 1968 (Ga. L. 1968, pp. 1072, 1074) amending Section 13 of the Appellate Practice Act as amended (*Code Ann.* § 6-809) apply. The Act of 1968 added a Paragraph (d) to Section 13 which, so far as here material, reads as follows: "Where it is apparent from the notice of appeal, the record, the enumeration of errors, or any combination of the foregoing . . . what errors are sought to be asserted upon appeal, the appeal shall be considered in accordance therewith notwithstanding . . . that the enumeration of errors fails to enumerate *clearly* the errors sought to be reviewed."

9. The Act approved August 19, 1918 (Ga. L. 1918, pp. 264, 265) was codified as Section 68-9916 of the Code of 1933, and as so codified, reads: "It shall be unlawful to buy, steal, sell, receive, or dispose of, conceal, or have in possession, any automobile, motor vehicle, bicycle, motorcycle, or any other machine propelled by gasoline or electricity, from which the manufacturer's serial number or any other distinguishing number or identification mark has been removed, defaced, covered, altered, or destroyed for the purpose of concealment or misrepresenting the identity of said motor vehicle, automobile, bicycle, motorcycle or other such machine. Whoever shall knowingly be guilty of the violation of this section shall be held and deemed guilty of a felony, and upon conviction thereof shall be punished by confinement and labor in the penitentiary for not more than ten years

and not less than one year." The Motor Vehicle Certificate of Title Act (Ga. L. 1961, p. 68 et seq.) in Paragraph (d) of Section 34 thereof (*Code Ann.* § 68-434a) provides: "A person who buys, receives, possesses, sells or disposes of a vehicle or an engine for a vehicle, knowing that an identification number of the vehicle or engine has been removed or falsified and with intent to conceal or misrepresent the identity of the vehicle or engine, is guilty of a felony." Paragraph (a) of Section 36 (*Code Ann.* § 68-9903) of this Act provides: "Felonies. A person convicted of a felony for the violation of a provision of this Act is punishable by a fine of not less than five hundred dollars ($500), nor more than five thousand dollars ($5,000), or by imprisonment for not less than one (1) year nor more than five(5)years, or by both such fine and imprisonment." Paragraph (n) of Section 2 of the Act of 1961 contains the following definition: " 'Vehicle' means a device in, upon, or by which a person or property is or may be transported or drawn upon a highway, except a device moved by human power or used exclusively upon stationary rails or tracks, or which obtains motive power from fixed overhead electric wires." P. 71. This Act did not expressly repeal *Code* § 68-9916, but did have a general repealer clause repealing all laws and parts of laws in conflict with the provisions of that Act. At this point it would seem that *Code* § 68-9916 was repealed, at least insofar as an automobile is conconcerned. The Act approved February 8, 1966 (Ga. L. 1966, pp. 10, 11) "amended" *Code* § 68-9916 by striking said Code section in its entirety and inserting in lieu thereof a new Code section by the same number. Paragraph (a) of that new section reads as fol-

lows: "It shall be unlawful to buy, sell, receive, dispose of, conceal, use, or possess any motor vehicle, as defined by an Act regulating traffic upon the highways, approved January 11, 1954 (Ga. L. 1953, Nov.-Dec. Sess., p. 556), or any part thereof from which the manufacturer's serial numbers or other distinguishing numbers or identifying marks have been removed, defaced, covered, altered or destroyed for the purpose of concealing or misrepresenting the identity of such motor vehicle." (Section 2 (a) of the Act of 1953 referred to contains almost the identical definition of "vehicle" as was contained in the Act of 1961). Paragraph (c) of the new *Code* § 68-9916 provides that any person who shall knowingly violate the provisions of Paragraph (a) "shall be guilty of a felony and upon conviction thereof shall be punished by confinement in the penitentiary for not less than one (1) nor more than five (5) years." The Act of 1966 enacting the new *Code* § 68-9916 contained a repealing clause as to all laws in conflict therewith and it appears therefrom that for the offense charged in the present indictment a fine is no longer part of the punishment. Only a sentence in the penitentiary from one to five years is proper. The trial court did not err in so instructing the jury.

10. The evidence was amply sufficient to authorize the verdict.

Judgment affirmed.
Jordan, P. J., and Deen, J. concur.

SUBMITTED MAY 8, 1968—DECIDED SEPT. 4, 1968—

REHEARING DENIED SEPT. 20 1968—

CERT. APPLIED FOR.

Possessing automobile with serial plate removed. Fulton Superior Court. Before Judge Schell.

Albert M. Horn, for appellant.

Lewis R. Slaton, Solicitor General, J. Walter LeCraw, J. Roger Thompson, for appellee.

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Supreme Court of the United States

October Term, 1998

No. 98-1008

OLGA [illegible] DANIEL,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1968

No._____

OLGA RUTH DANIEL,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent prays that the Petition For Writ of Certiorari be denied, for the reasons herein given.

CITATION TO OPINION BELOW

The opinion of the Georgia Court of Appeals is reported at 118 Ga. App. 370, 163 S.E. 2d 863. The denial of the Motion For Re-hearing follows said decision, and noted at 118 Ga. App. 375, 163 S.E. 2d 863. The actions of the Supreme Court of Georgia on Respondent's petition for certiorari are unreported.

JURISDICTION

The jurisdiction of the court is conceded.

QUESTIONS PRESENTED

Respondents cannot agree with the articulation relied upon by petitioner in stating the questions presented, since the same disregards the facts in the case. Accordingly, Respondents have reworded the questions in light of the actual evidence introduced on the trial as follows:

1. When a search is made pursuant to a lawful search warrant, and instrumentalities by which the crime was committed seized, and the defendant arrested at the same time, pursuant to a valid arrest warrant, can that evidence be suppressed because not specified particularly in the warrant?

2. Does due process require that a defendant be permitted to view the entire statement given the State by its principal witness, when that statement relates to much more than the case on trial, and when the defendant has been furnished with that portion of the statement relating to the case on trial, as determined by the Court in an in camera inspection of the entire statement?

STATEMENT OF THE CASE

While Petitioner's statement of the case is essentially correct, said statement omits certain salient portions thereof which are essential to this Court's determination of whether or not to grant the Writ of Certiorari. Accordingly said portions will be included in Respondent's additions to the statement of the case.

THE SEARCH

Both Erby Joe Daniel, hereafter referred to as Erby, and his mother, the petitioner, were indicted for this

offense for which Petitioner stands convicted. Indictment No. 93555 related to Erby, and Indictment No. 93556 relates to the Petitioner.

Detective Norton first learned of Olga Daniel's dealings with the car in question from Russell Gugliotta (R-172; T-143), and immediately called upon Erby, ostinsibly the owner of the car, said conversation taking place on December 5, 1967 (R-190; T-161).

During this conversation Erby admitted that he was the owner of the car, and that he had purchased it from one Sol Greenberg, for $3,100.00 at the Riviera Motel a (motel in Atlanta, Fulton County, Georgia), that he had taken the car to Clearwater, Florida, but that the car's papers were in his safe deposit box in a bank in Atlanta. Erby was accompanied to the bank, but could not produce any of the car's papers (R-145-7; T-116-118). At this time Detective Norton had already been informed by Gugliotta that he was contacted by Salvatore, alias Little Sally and Robert Medine, alias Little Rabbit, on November 3, 1967, that they had brought the car in question from New York to deliver to Petitioner. Gugliotta accompanied them to Petitioner's apartment. (R-228; T-199), where she bought the car for $1,500.00, paying $500.00 cash and receiving $500.00 credit for each of two stolen Cadillacs which she helped dispose of. (R-229; T-200). Gugliotta witnessed the transaction to be sure that "Sally" and "Little Rabbit" were paid by Petitioner (R-231; T-202).

After Detective Norton's conversation with Erby, the car was located in Clearwater, Florida by the F.B.I. Detective Norton went to Clearwater, checked the car and made an imprint of the correct V.I.N. number which

he compared with the fraudulent V.I.N. plate attached to the doorpost. (R-148-52; T-119-123).

Detective Norton returned to Atlanta, and obtained an arrest warrant for Petitioner and Erby, and a search warrant for Petitioner's apartment, said warrants being obtained on December 9, 1967, (R-163; T-134), and executed on December 19, 1967 (R-188; T-159). Accompanying him on the raid was Mr. Roger Thompson, the Assistant Solicitor General who prosecuted the case.

During the course of the search, not after its completion, the arrest warrants against Petitioner and Erby were executed (R-156, 169, 188; T-127, 140, 159).

During the course of the search State's exhibits 11, 12, 13, and 14 were seized. Of these the two receipts were in open view—Petitioner had removed them from her pocketbook and attempted to hide them under her dress; but they were taken from her hand (R-167; T-138).

THE STATEMENT

Instrumental in the conviction of Petitioner was the testimony of Russell Gugliotta, an accomplice of Petitioner who had previously been convicted in the Superior Court of Fulton County, Georgia, for the offense of possession of an automobile with an altered serial plate, and who received a sentence of five years imprisonment therefor. After his conviction, Gugliotta gave the police a lengthy statement relating to the Mafia's activities, a portion of which related to the Petitioner and the case on trial. (R-220; T-191; R-226-8; T-197-9; R-246; T-217).

During the course of the trial, Petitioner made numer-

ous requests to be allowed to view the entire Gugliotta statement, which requests the Court denied until after the State had rested, at which time the Court directed the Prosecutor to furnish the Petitioner with that portion of the statement relating to her and the case on trial. The Prosecutor anticipated the Court's ruling and had previously prepared such portion which he submitted to the Court, along with the entire statement, for an in camera inspection thereof for the purpose of determining whether or not the Prosecutor had complied with the Court's order. The Court held such an examination and determined that the Prosecutor had complied with the Court's request. (R-258-263; T-229-234).

REASONS FOR NOT GRANTING THE WRIT

1. WHEN A SEARCH IS MADE PURSUANT TO A LAWFUL SEARCH WARRANT, AND INSTRUMENTALITIES BY WHICH THE CRIME WAS COMMITTED SEIZED, AND PETITIONER ARRESTED CONTEMPORANEOUSLY THEREWITH, PURSUANT TO A VALID ARREST WARRANT OBTAINED AT THE SAME TIME AS THE SEARCH WARRANT, SUCH EVIDENCE IS NOT ENTITLED TO BE SUPPRESSED BECAUSE THE ITEMS SEIZED WERE NOT SPECIFIED IN THE SEARCH WARRANT.

Petitioner complains of the introduction into evidence of three items seized during the course of the search of her apartment. The basis of the complaint is, not that the police officer had insufficient probable cause to obtain the search warrant, but that the officer had little expectation of locating the items named in the search warrant in a search of Petitioner's apartment at

the time the search took place – that the issuance of the search warrant was merely an excuse for a general search.

Conceding that a general search is unlawful, Petitioner ignores the fact that at the same time the search warrant for her apartment was obtained, arrest warrants for herself and her son were also obtained, which warrants were executed during the course of the search. While it is generally true that papers not described in a search warrant may not be seized, an exception to said rule exists, where the papers seized are instrumentalities of the crime itself. *Woo Lai Chun v. United States,* 274 F. 2d 708 (9th Cir., 1960), *Marron v. United States,* 275 U. S. 192, 196; 48 S. Ct. 74; 72 L. Ed. 231, 237 (1927); *Takahashi v. United States,* 255 U. S. 298, 41 S. Ct. 261, 264; 65 L. Ed. 647, 651 (1921); *United States v. Lefkowitz,* 285 U. S. 452, 52 S. Ct. 420, 76 L. Ed. 877, 82 ALR 775 (1932); *Go-Bart Importing Co. v. United States,* 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374 (1931); *Gouled v. United States,* 255 U. S. 298 (7) (1920). Respondent submits that the articles complained of constituted instrumentalities of the crime itself, for they enabled Petitioner to obtain a valid title to the stolen car in question. However, even if the items seized constituted mere evidence of the crime, they are still subject to seizure. *Warden v. Hayden,* 387 U. S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1968).

Notwithstanding the search warrant however, the items were still entitled to seizure because they were seized contemporaneously with the arrest of Petitioner and her son. *Marron v. United States, supra; United States v. Rabinowitz,* 339 U. S. 556; *Harris v. United States,* 334 U. S. 699; *Abel v. United States,* 362 U. S. 217 (1960).

2. DUE PROCESS DOES NOT REQUIRE THAT A DEFENDANT BE PERMITTED TO VIEW THE ENTIRE STATEMENT GIVEN THE STATE BY ITS PRINCIPAL WITNESS, WHEN THAT STATEMENT RELATES TO MUCH MORE THAN THE CASE ON TRIAL, AND WHEN THE DEFENDANT HAS BEEN FURNISHED WITH THAT PORTION OF THE STATEMENT RELATING TO THE CASE ON TRIAL, AS DETERMINED BY THE COURT IN AN IN CAMERA INSPECTION OF THE ENTIRE STATEMENT.

As previously mentioned the statement given by Gugliotta related to the activities of the Mafia, with only a small portion thereof relating to the case on trial. The Prosecutor anticipated the Court's ruling regarding the statement, and removed therefrom that portion of the statement relating to the case on trial, which portion was subsequently furnished the Petitioner for the purposes of cross-examining Gugliotta. Prior thereto, the Court was furnished with the entire statement for comparison with the portion to be furnished Petitioner, and the Court agreed that the portion to be furnished was all that the statement contained relating to the case on trial.

Petitioner concedes that she is asking the Court to clothe the ruling of the court in *Jencks v. United States,* 353 U. S. 657 (1956) with constitutional proportions. This Court has specifically refused to do so, the most recent occasion being January 14, 1969, *United States v. Augenblick,* No. 45, Oct. Term, 1968, 37 L.W. 4081, 84. See also *Palermo v. United States,* 360 U. S. 343. The Jencks rule is merely an evidentiary rule authorized by this Court's supervisory function of the lower fed-

eral courts, and should not be raised to the level of a constitutional requirement.

CONCLUSION

For all the foregoing reasons, Respondent urges this court to decline to issue the Writ of Certiorari in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Post Office, Atlanta, Georgia, three copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari with first class postage prepaid, addressed to Albert M. Horn, Esquire, 725 Candler Building, Atlanta, Georgia 30303, counsel of record for Appellant.

This.....day of February, 1969.

JOEL M. FELDMAN
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